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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ELPIS SAKARIA, *et al.*,

Petitioners,

v.

TRANS WORLD AIRLINES

Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 22, 1994

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QUESTIONS PRESENTED FOR REVIEW

1. Whether on *de novo* review of a summary judgment record it is proper for a court of appeals to decide a question of causation on the basis of an expert witness' response to a hypothetical?

2. What is the proper standard under the Warsaw Convention for assessing whether plaintiffs' medical expert established a causal nexus between a terrorist attack and a passenger's fatal heart attack sufficient to overcome a motion for summary judgment?

3. Under *Air France v. Saks*, may evidence of causation be demonstrated through a passenger's state of mind following an accident?

4. Assuming *arguendo* the propriety of the lower court's rendering of decedent's statements as subject to hearsay attack for the purposes of determining causation under Article 17, were the statements nevertheless admissible under the "excited utterance" exception of Fed. R. Evid. 803(2)?

LIST OF PARTIES

The parties to the proceeding below were Elpis Sakaria, individually and as personal representative of the Estate of Jagdish Sakaria, Alexander J. Sakaria, Raj J. Sakaria, and Maria K. Sakaria, Petitioners herein; and Trans World Airlines, Respondent herein.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Elpis Sakaria, *et al.*, request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on October 25, 1993.

OPINION BELOW

The *Opinion* of the court of appeals is reported at 8 F.3d 164 (4th Cir. 1993) and is reproduced in the Appendix (App.) at 1a.

JURISDICTION

The Fourth Circuit's denial of a petition for rehearing and suggestion for rehearing *en banc* was entered November 22, 1993. On February 7, 1994, Chief Justice Rehnquist extended the time for filing the instant petition to and including March 22, 1994. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

TREATY PROVISION INVOLVED

Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw, Oct. 12, 1929, Article 17.[1]

The carrier is liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

STATEMENT

1. The Terrorist Attack At The Rome Airport

Petitioners Elpis Sakaria and her children are the survivors of Jagdish Sakaria, a passenger aboard a TWA flight from Washington, D.C. to Athens, Greece in December 1985. Shortly before Mr. Sakaria's flight landed in Rome, terrorists attacked the TWA ticket counter and embarkation area, killing fourteen people and injuring others. 8 F.3d at 166, App. at 3a.

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[1] 49 Stat. 3000 T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C. app. § 1502 note.

When the plane landed, the captain announced to the passengers that an "armed altercation" had occurred at the airport. The plane was met by an armored security vehicle which remained nearby while the passengers were held in the plane for about two hours. Meanwhile, the air conditioning inside the plane was turned off and the outside temperature was about 90 degrees. Not surprisingly, there were complaints that it was "close and warm" inside the plane. The aircraft, a Boeing 747, had about 400 passengers aboard and was filled to capacity. According to the captain, there was "tremendous curiosity" among the passengers about the terrorist incident and concern for the safety of families at the airport. During the wait, another armored vehicle and a helicopter patrolled in the distance. *Ibid.*

The passengers were eventually bussed to the terminal and taken to a makeshift waiting area that was not the normal transit lounge for passengers. The terminal area was sealed off and patrolled by armed security guards. The makeshift area had no bathrooms, but passengers were permitted access to a men's room located upstairs near where the terrorist attack took place. After about two hours in the holding area, the passengers were bussed to a different plane, and the flight continued to Athens. *Ibid.*

2. Jagdish Sakaria's Fatal Heart Attack

Mr. Sakaria was met at the Athens airport by Nicholas Bafitis, a friend from the United States who was visiting family in Greece. Mr. Bafitis testified in an affidavit that Mr. Sakaria, on disembarking from the plane, was "extremely pale and yellow," that his eyes were "swollen" with "black circles" under them, and that he looked "terrified." Bafitis Aff., App. at 31a. Mr. Bafitis further stated that Mr. Sakaria "held his throat and neck and complained of thirst while recounting his experience in Rome in angry, excited tones." 8 F.3d at 167, App. at 4a. His anger was heightened by the fact that "his flight was supposed to be a nonstop flight." Bafitis Aff., App.

at 31a, 33a.. (Mr. Sakaria's wife had specifically requested a nonstop flight when she purchased her husband's ticket, and "neither the ticket nor the itinerary reflected the intermediate stop in Rome.") 8 F.3d at 166, App. at 3a; Bafitis Aff., App. at 31a.

Later that day, at the house of Mr. Bafitis' father, Mr. Sakaria continued to relate the events in Rome. In an angry, excited voice he talked about the aftermath of the terrorist attack and reported seeing bodies when he went upstairs to the bathroom inside the terminal. Bafitis Aff., App. at 32a. When he saw the bodies, he vomited. Mr. Sakaria also talked about how frightened he had been aboard the plane, having seen an armored vehicle and soldiers with machine guns. At the Bafitis home that evening, Mr. Sakaria refused food because he felt as if eating would make him vomit. 8 F.3d at 167, App. at 4a; Bafitis Aff., App. at 33a.

The next day, Bafitis drove Mr. Sakaria from Athens to Volos, a village where Mr. Sakaria's children lived with his wife's parents. In Volos, Mr. Sakaria remained very agitated, continued to refuse food, and broke out in tears several times while describ-ing his experience in Rome. *Ibid.* Sometime during the second night of his arrival, he died as a result of a heart attack. 8 F.3d at 167, App. at 5a.

The Sakarias brought a federal diversity suit seeking damages under theories of breach of contract and tort on the basis of state law survival and wrongful death claims. TWA's answer denied the allegations of the complaint and asserted the Warsaw Convention as an affirmative defense limiting its liability. *Ibid.*

3. Dr. Marsh's Testimony

Petitioners sought the expert testimony of a cardiologist, Dr. Brandis Marsh. Dr. Marsh first wrote a letter to Petitioners' trial counsel, in which he concluded that Mr.

Sakaria's heart attack was "provoked by the circumstances of travel." Marsh Letter, App. at 20a. The principal focus of his letter is Mr. Bafitis' description of Mr. Sakaria's physical appearance -- bearing the evident manifestations, wrote Dr. Marsh, of a heart attack victim. Mr. Bafitis' "description of Mr. Sakaria when the latter deplaned in Athens," said Dr. Marsh, "is wholly consistent with the appearance of a patient who has sustained recently an acute myocardial infarction." *Ibid.* He noted in a single sentence that Mr. Sakaria "saw rather graphic evidence of the carnage caused by the bombing," while in an entire paragraph he discussed the stress-inducing effects of prolonged confinement aboard the plane: "I have no doubt that the stress generated by confinement under those circumstances could have severe adverse implications in a patient predisposed for some reason to a heart attack." Marsh Letter, App. at 19a-20a.

Opining "to a reasonable degree of medical certainty," Dr. Marsh stated that Mr. Sakaria "sustained an infarction at some time between his arrival in Rome and his arrival in Athens." He concluded that "the evidence [is] more than adequate to come to a conclusion that the patient died as a result of a rhythm disorder caused by a myocardial infarction provoked by the circumstances of travel." *Ibid.*

At Dr. Marsh's deposition, opposing counsel encouraged him to withdraw his opinion that Mr. Sakaria's death was "provoked by the circumstances of travel" if it were assumed that Mr. Sakaria had, in fact, "never seen any bodies, never saw any blood." Marsh Dep., App. at 24a. Dr. Marsh refused to diminish the certainty of his opinion unless it were assumed that the air conditioning on the plane was operating during the period of confinement and the atmosphere among the passengers was not tense.

> A. I read [Mr. Bafitis'] initial statement to imply that Mr. Sakaria saw bodies. He saw blood. He saw damage in the airport. Yes. If that turned

> out not to be true *and if it turned out not to be true that he really was kept on an airplane for an hour and a half in an uncomfortable environment, et cetera, et cetera*, yeah, I don't think I could make the same conclusion at that point.

Ibid. (emphasis added). Dr. Marsh was then asked to assume that Mr. Sakaria saw no carnage and no blood.

> Q. Does that affect any of the opinions that you have given in your letter?
>
> A. *Again, let me add one additional presumption, which I think is in the spirit of your question; and that is that that hour and a half on the runway is not characterized by a heat stifling environment, et cetera, et cetera.*
>
> Q. Yes. Let's assume that's true. And let's add that the mood on the plane is quiet and calm.
>
> A. Yes. That hypothetical would clearly lead me to a very different opinion.

Ibid. (emphasis added).

Dr. Marsh later affirmed his opinion that Mr. Sakaria's death was the result of trauma sustained during the period of Mr. Sakaria's travel.

> Q. Is it your opinion, then, Dr. Marsh, that this heart attack and subsequent death was caused by some sort of trauma?
>
> A. Yes, sir.
>
> Q. So, assuming then that there was trauma of some sort during the period of travel, is it your

opinion then that whatever happened which caused his death was an accident?

A. I think it was. Yes, sir. Making those assumptions.

Marsh Dep., App. at 28a.

4. The District Court's Ruling

Following discovery, TWA moved for summary judgment on all claims, on the theory that Mr. Sakaria's statements to Mr. Bafitis were inadmissible hearsay. TWA also argued that Dr. Marsh had "recanted" his original opinion that Mr. Sakaria's heart attack had been provoked by the stress of the stop in Rome. 8 F.3d 167, App. at 6a.

The district court referred the case to a magistrate judge, who recommended that summary judgment be granted for TWA. She refused to consider the statements of Mr. Sakaria to Mr. Bafitis, concluding that they were uncorroborated hearsay ... bearing no guarantee of trustworthiness." *Id.* at 168, App. at 7a. She also denied the Sakarias a hearing and recommended that their request for additional discovery be rejected. The district court adopted the magistrate's recommendations and granted summary judgment for TWA. *Ibid.*

5. The Court of Appeals' Decision

The Sakarias appealed the decision of the district court to the court of appeals, which affirmed summary judgment in TWA's favor, "though on reasoning independent of the district court's." 8 F.3d at 166, App. at 2a.

The court of appeals first addressed the issue whether the Sakarias' claims were cognizable under Article 17 of the Warsaw Convention. The court concluded that "the district court properly declined to consider as part of the summary

judgment record the substance of the statements ascribed to Mr. Sakaria in the Bafitis affidavit" because, said the court, the facts set forth in the affidavit would not be admissible in evidence. *Id.* at 171, App. at 13a. Nor, according to the court of appeals, would Mr. Sakaria's statements fall within the "excited utterance" exception of Fed. R. Evid. 803(2). Because "Mr. Sakaria had been subject to hallucinatory misperceptions of reality" (*ibid.*, App. at 14a) since an accident in 1978, the court concluded that the ordinary trustworthiness of excited utterances would not attach in this case.[2]

Ignoring the Bafitis affidavit, the court of appeals considered the evidence whether Mr. Sakaria's death was causally related to "the period of uncomfortable confinement in the aircraft by one knowing that it was caused by an 'altercation' that justified visible security precautions." 8 F.3d at 172, App. at 15a. The court concluded that the summary judgment record did not present an issue of material fact "as to the required link of causation between that event and Sakaria's death." *Ibid.*

In the court's view, Dr. Marsh's opinion that the events at the Rome airport probably provoked Mr. Sakaria's heart attack "was effectively renounced once the possible cause was limited to the prolonged wait in the aircraft." *Ibid.*, App. at

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[2] Mr. Sakaria had suffered an automobile accident in 1978 which resulted in memory problems, depression, and occasional disorientation and paranoid feelings -- conditions which "improved considerably" over the *(cont'd)* course of time, according to Dr. Ayub K. Ommaya, a nuerosurgeon who had examined Mr. Sakaria after his accident. Ommaya Decl., App. at 35a. Dr. Ommaya "state[d] unequivocally that Mr. Sakaria was not suffering from a mental illness ... or mental infirmity ... as a result of his head injury" and that it was "highly unlikely that Mr. Sakaria experienced delusions, hallucinations, or confabulation on the date of the incident in question. Rather, in my opinion, to a reasonable degree of medical certainty, Mr. Sakaria's experience was based on reality." *Id.*, App. at 36a.

16a. The court concluded that Dr. Marsh's testimony "would not suffice under our standard to support the requisite finding of causation, as to which the Sakarias of course had the burden of proof...." This is so because "proof of causation must be such as to suggest 'probability' rather than mere 'possibility.'" *Ibid.*[3]

The court of appeals affirmed the district court's dismissal of Petitioners' case. The court denied Petitioners' request for rehearing and suggestion for rehearing *en banc*. App. at 18.

REASONS FOR GRANTING THE WRIT

Under Article 17 of the Warsaw Convention, a carrier is strictly liable for injury sustained in the course of international travel where an "accident" which "took place on board the aircraft or in the course of any of the operations of embarking or disembarking" caused the "death ... or other bodily injury" of a passenger. *Warsaw Convention, Article 17, supra.* The Sakarias identified two events to the court of appeals which qualified as "accidents" within the meaning of Article 17. First was the prolonged confinement of Mr. Sakaria and several hundred other passengers aboard the parked plane in the circumstances following the terrorist attack at the Rome airport. Second, Petitioners asserted that Mr. Sakaria's later exposure to the sight of covered bodies of those killed in the terrorist

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[3] With respect to the state-law survival and wrongful death claims, the court of appeals affirmed summary judgment on the ground that TWA's failure to provide enough fuel to fly past Rome, even if that constituted negligence, "would not support a finding of proximate causation between that negligence and Sakaria's death." 8 F.3d at 173, App. at 17a. As to the contract claim, the court concluded that even assuming a breach of contract in stopping over in Rome, "the risk that Mr. Sakaria's death would somehow be caused by the event in conjunction with a terrorist attack" was "too remote to allow recovery in contract." *Ibid.*

attack, as he reported that experience to Mr. Bafitis, was an "accident" under the Warsaw Convention.

The court of appeals declined to consider whether either of these events constituted an "accident" under Article 17. Instead, the court held that because Dr. Marsh "effectively renounced" his testimony, Petitioners had failed to demonstrate that any incident in Rome caused the death of Mr. Sakaria. As we show in Section I, in this the court of appeals became the trier of disputed fact -- a departure from this Court's construction of Fed. R. Civ. P. 56. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Dr. Marsh plainly did not renounce his opinion. In Sections II and III, we show that, for independent reasons, the lower court's rendering of the causation question resulted from a misapplication of *Air France v. Saks*, 470 U.S. 392 (1985). Section IV demonstrates that the court of appeals misconstrued Fed. R. Evid. 803(2) when it held that Mr. Sakaria's excited statements to Mr. Bafitis were inadmissible hearsay.

Review by the Court is warranted to correct these errors. The questions raised are substantial because they flow from unresolved issues under the Warsaw Convention and this Court's rendering of Article 17 in *Air France v. Saks*.

I. THE COURT OF APPEALS ERRED IN GRANTING SUMMARY JUDGMENT WHEN IT DECIDED THE ISSUE OF CAUSATION ON THE BASIS OF DR. MARSH'S ANSWER TO A COUNTERFACTUAL HYPOTHETICAL.

The court of appeals dismissed the testimony of the Sakarias' medical expert, Dr. Brandis Marsh, as insufficient "under our standard to support the requisite finding of causation" because it suggested "mere 'possibility'" rather than "'probability.'" 8 F.3d at 172, App. at 16a. But in this the court of appeals slipped from its designated role of determining whether there was a "genuine issue of material fact" (Fed. R.

Civ. P. 56(c)) to determining whether it believed Dr. Marsh's testimony. The judge is not to "weigh the evidence and determine the truth of the matter" (*Liberty Lobby*, 477 U.S. at 249), and thus may not conduct a "trial on the affidavits" (*id.* at 255). In particular, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Ibid.*

This is a "strict standard" for which "[a]ny doubts" as to the existence of an issue of material fact must be resolved against the moving party and the evidence must be construed "in the light most favorable to the party opposing the motion." J. Friedenthal, M. Kane, A. Miller, *Civil Procedure* § 9.3, at 444 (2d ed. 1993). Summary judgment may not be entered where "moving parties ... [have] not foreclosed the possibility of the existence of certain facts" from which a jury might find for the nonmoving party. *Liberty Lobby*, 477 U.S. at 249. *See also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

The court of appeals failed to observe these requirements. It overstepped its role and usurped the function of the jury as finder of fact. The court's only conclusion concerning Dr. Marsh was that he "effectively renounced" his opinion that the events in the aircraft and at the terminal caused Mr. Sakaria's heart attack "once the possible cause was limited to the prolonged wait in the aircraft." 8 F.3d at 172, App. at 16a. Dr. Marsh did nothing of the kind. Rather, he was asked if he would alter his opinion if there were no extraordinary incident in the Rome airport *and if there were no unusual conditions on the aircraft.*

The record on this point could not be any plainer. Dr. Marsh was asked in deposition whether his opinion would be affected if it could be shown that Mr. Sakaria saw no bodies, no blood, and no damage in the Rome airport. He responded, "Yes. If that turned out not to be true *and if it turned out not to be true that he really was kept on an airplane for an hour*

and a half in an uncomfortable environment." Marsh Dep., App. at 24a. Opposing counsel accepted the qualification and repeated the question: Let's assume that's true. And let's add that the mood on the plane is quiet and calm." Dr. Marsh answered, quite reasonably, "Yes. That hypothetical would clearly lead me to a very different opinion." *Ibid.*

But the questioner's "hypothetical," as Dr. Marsh characterized it, became the court of appeals' unexamined assumption. The whole line of questioning is transmogrified, corrupted by the court: "[Dr. Marsh's] original opinion that the totality of the events as allegedly recounted by Sakaria ... probably provoked the heart attack was effectively renounced once the possible cause was limited to the prolonged wait in the aircraft." 8 F.3d at 172, App. at 16a. The court of appeals did not purport to rest its decision on any other facts than this "renunciation" which Dr. Marsh treated strictly as a "hypothetical." Indeed, the lower court acknowledged that with respect to the conditions on the aircraft, Dr. Marsh had relied on "admissible evidence." *Id.* at 173, App. at 16a. The court noted that the plane was held on the runway for two hours, that the air conditioning was shut down "[w]ithin three or four minutes of landing," and that the filled-to-capacity flight became "'close and warm.'" *Id.* at 166, App. at 3a.

These facts are precisely the assumptions upon which Dr. Marsh based his conclusion, and they are the assumptions he was asked to ignore "hypothetical[ly]" by opposing counsel. Given Dr. Marsh's expert opinion on the causal link between the conditions on the plane and Mr. Sakaria's heart attack, a jury could reasonably find in favor of the Sakarias. It was therefore error as a matter of law for the court of appeals to preclude the case from going to a jury.

In light of the uncontradicted evidence in the summary judgment record, it should have been unmistakably clear to the lower court that there are sufficient material questions of fact in play here to warrant a trial. In short, on the basis of this

record, "a jury could find *either* that the plaintiff proved his case by the quality and quantity of evidence required by the governing law or that he did not." *Liberty Lobby*, 477 U.S. at 241. This is all the law requires for the Sakarias to have overcome TWA's motion for summary judgment. The Sakarias discharged their burden. TWA's motion should have been denied, and the court erred in granting it.

II. THE COURT OF APPEALS MISAPPLIED THE PROPER STANDARD UNDER THE WARSAW CONVENTION WHEN IT ASSESSED THE ADEQUACY OF THE CAUSAL NEXUS BETWEEN THE TERRORIST ATTACK AND MR. SAKARIA'S FATAL INJURY.

Even if the matter of Dr. Marsh's testimony were not so clear, the lower court committed an analytical error in the way it parsed Article 17 of the Warsaw Convention. The court bracketed the issue whether prolonged confinement in the aftermath of a terrorist attack was an "accident" under this Court's decision in *Air France v. Saks* because "the summary judgment record does not present a genuine issue of material fact as to the required link of causation between that event and Sakaria's death." 8 F.3d at 172, App. at 15a. In so doing, the court committed an error, for it implicitly treated the question whether an accident occurred as analytically separable from the question whether Mr. Sakaria's death was causally related to the accident.

In *Saks*, a passenger aboard an Air France flight from Paris to Los Angeles felt severe pressure and pain in her left ear as the plane descended for landing. The passenger thereafter consulted a doctor who concluded she had become permanently deaf in that ear. The passenger's suit alleged that her hearing loss was caused by the negligent operation of the jetliner's pressurization system. Air France moved for summary judgment on the ground that the plaintiff could not prove her

injury was caused by an "accident," inasmuch as the evidence indicated that the pressurization system had worked normally. This Court granted review to parse the meaning of "accident" under Article 17 -- more specifically, to decide between two alternative definitions of "accident" in usage under tort law: "An accident that is the cause of an injury and an injury that is itself an accident." 470 U.S. at 399.

The Court adopted the first use of the word, which it clarified as follows: "[W]hile the word 'accident' is often used to refer to the event of a person's injury, it is also used to describe a cause of injury, and when the word is used in this latter sense, it is usually defined as a fortuitous, unexpected, unusual, or unintended event." *Id.* at 400 (emphasis added). Thus, "liability under Article 17 ... arises only if a passenger's injury is caused by an unexpected or unusual event that is external to the passenger...." *Id.* at 405. On the other hand, "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, expected operation of the aircraft, it has not been caused by an accident, and Article 17 ... does not apply." *Ibid.* The plaintiff in *Saks* failed because she could show no more than that she experienced her ear problem *in the course of normal air travel* -- that is, her hearing loss was not the result of an "accident."

The critical difference between this case and *Saks* is that in *Saks*, the passenger could not demonstrate that any aspect of her course of travel qualified as an "accident" under Article 17. Had there been evidence, for instance, that a crack in the fuselage of the plane caused the cabin to depressurize -- an event indisputably "accidental" -- there would have been no question that the plaintiff would have survived Air France's summary judgment motion, and the case would have been tried.

The appropriate standard under *Saks* for resolving the issue of causation is implicit in the facts of that case. To identify the causal connection between an event and an injury, one looks for a variable present in the case involving injury but

absent in the normal course of affairs. It may be that the only variable to be found is an event which *may* have caused the injury, although it is not known to do so generally -- that is, the event cannot be ruled out as a cause of the injury, but it is merely a possible cause. In other cases, the variable found correlates or "fits" with the type of injury in question. That is, the unusual circumstances are known to be the type of event which causes such an injury. When evidence is of this latter type, the evidence of the occurrence of an "accident" is, at the same time, evidence for its cause. A variable of this sort is described by the Court in *Saks* as something "fortuitous, unexpected, unusual, or unintended." *Id.* at 405. That is why, in *Saks*, evidence of a depressurized cabin would have been decisive: It would have constituted, at one and the same time, evidence for an accident's having occurred *and* evidence of causation. For, a flux in pressurization is an unusual event of a kind known to cause ear problems. Identifying an event which bears such a correlation to the kind of injury suffered *ipso facto* establishes the probability of a causal relation. Because of the logical interdependence between "accident" (as defined in *Saks*) and causation, the two issues cannot be resolved independently.

In the instant case, the particular circumstances of the plane's being parked on the runway in the aftermath of a terrorist attack qualify as "an unexpected or unusual event or happening that is external to the passengers." *Ibid.*[4] Moreover,

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[4] Applying the *Saks* principles to characterize the circumstances of Mr. Sakaria's travel, it should be beyond rational dispute that an "accident" in the sense of "an unexpected or unusual event or happening external to the passenger, *id.* at 405, befell Mr. Sakaria. His flight touched down minutes after a savage terrorist attack upon the terminal, as a result of which: Mr. Sakaria and other passengers (numbering about 400) were confined in *(cont'd)* a jetliner for approximately two hours, with the air conditioning turned off, the outside temperature approaching 90 degrees, the captain having announced that an "armed altercation" had just occurred at the airport, an armored vehicle waiting outside the plane, another armored vehicle and helicopter patrolling in the distance, and evident concern among

this unusual event is a kind that would create the stress capable of inducing a heart attack. Therefore, in finding evidence of such an event, the probability of a causal nexus is also established.

The error in the court of appeals' analysis on this score is that the court ignored the issue whether the events in Rome constituted an "accident," when that issue's resolution is logically intertwined with the issue of causation. Although the court assumed for the sake of argument that an "accident" had occurred, it failed to focus any further on the logical implications of such a determination under *Saks*. Contrary to the lower court's approach, the teaching of *Saks* is that causation cannot be resolved independent of the issue whether an "accident" occurred. Had the court properly executed its Article 17 analysis in light of *Saks*, it would have concluded that an "accident" had occurred and that the testimony of Dr. Marsh, correlating the stress of the "accident" with Mr. Sakaria's heart attack, had supplied the requisite causal nexus to overcome TWA's motion for summary judgment.

III. EVIDENCE OF MR. SAKARIA'S STRESS OVER THE TERRORIST ATTACK IS EVIDENCE OF CAUSATION UNDER *AIR FRANCE V. SAKS* IRRESPECTIVE OF THE ADMISSIBILITY OF HIS HEARSAY STATEMENTS.

The court of appeals concluded that "the district court properly declined to consider ... the substance of the statements ascribed to Mr. Sakaria in the Bafitis affidavit" because the facts set forth therein were hearsay which would not be admissible in evidence. 8 F.3d at 171, App. ar 13a. For this

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(cont'd) passengers over the attack and the safety of families waiting inside the airport.

reason, the court rejected Mr. Sakaria's statements to Mr. Bafitis without considering their value, apart from their truthfulness, for the purposes of its causality analysis. This constituted error. Even if Mr. Sakaria's statements to Mr. Bafitis are subject to hearsay attack, the statements are nonetheless admissible for the purposes of assessing causality under Article 17.

Because there is credible medical testimony that events occurring in the course of Mr. Sakaria's travel caused his heart attack, "it is for the trier of fact to decide whether an 'accident' ... caused the passenger's injury." *Saks*, 470 U.S. at 405. The only requirement for an "accident" under *Saks* is that the initial cause of the injury be some external event of an unusual character. As this Court noted in *Saks*, "Any injury is the product of a chain of causes, and we require only that the passenger be able to prove that some link in the chain was an unusual or unexpected event external to the passenger." *Id.* at 406. There was ample record evidence that Mr. Sakaria's heart attack was causally related to the events surrounding the terrorist attack. *If Mr. Sakaria's reaction to that objective experience were compounded by the terror of an imagined incident*, that aspect of the record only fortified -- it did not diminish -- Petitioners' causation evidence. So long as the chain of events included one link which qualified as an "unusual or unexpected event," Mr. Sakaria's report of his experience to Mr. Bafitis, as reflective of Mr. Sakaria's reaction to the totality of the circumstances following the landing in Rome, was causation evidence which the court of appeals wrongly isolated from its analysis. For example, in *Salerno v. Pan American World Airways, Inc.*, 606 F. Supp. 656 (S.D.N.Y. 1985), the district court held that a bomb threat resulting in a passenger's suffering a miscarriage twenty-four hours later constituted an "accident" under Article 17. The fact that no

bomb was located was irrelevant to the passenger's perception of a serious threat.[5]

Here, Mr. Sakaria reacted to an objectively verifiable event which was not part of the normal or expected operation of the airline. Petitioners provided sufficient evidence that the Rome incident was causally related to Mr. Sakaria's death to permit a jury to decide the facts, including the significance of Mr. Sakaria's reaction. Summary judgment on the issue whether a particular event qualifies as an "accident" is appropriate only "when the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Saks*, 470 U.S. at 406. That counterfactual does not obtain here. Mr. Sakaria's excited statements were likely to be trustworthy evidence of his state of mind and emotional condition, a proposition with which the court of appeals agreed. 8 F.3d at 172 n. 10, App. at 14a. Accordingly, the court of appeals misconstrued *Saks* when it discarded Mr. Sakaria's statements to Mr. Bafitis as inadmissible hearsay, for their value to the truthfulness of the facts asserted was not the critical issue for the court's causation analysis.

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[5] "It is undisputed ... that a terrorist attack is considered an 'accident' within the purview" of Article 17. *Day v. Trans World Airlines, Inc.*, 538 F. 2d 31, 33 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976). *See Evangelinos v. Trans World Airlines, Inc.*, 550 F. 2d at 154; *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322, 1323 (C.D. Col. 1975); *(cont'd) Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F. 2d 1240 (2d cir. 1973)(*per curiam*).

IV. THE COURT OF APPEALS ERRED IN DEEMING THE EXCITED UTTERANCE EXCEPTION TO THE HEARSAY RULE INAPPLICABLE TO MR. SAKARIA'S STATEMENTS TO MR. BAFITIS.

Assuming *arguendo* that the court of appeals' hearsay analysis had been appropriate, the court misinterpreted Fed. R. Evid. 803(2) when it held that Mr. Sakaria's statements to Mr. Bafitis upon arriving in Athens were inadmissible hearsay. The court's refusal to accept Mr. Bafitis' affidavit after acknowledging the spontaneity of Mr. Sakaria's statements and concluding that "deliberate fabrication is not likely" (8 F.3d at 172 n. 10, App. at 14a) is significant error warranting this Court's review.

In order for a statement to be considered under the "excited utterance" exception to the hearsay rule, two criteria must be satisfied. First, the declarant must have experienced a startling event or condition, and second, he must have reacted while under the stress or excitement of that event and not as the result of reflection or fabrication. *See* J. Weinstein & M. Berger, 4 *Weinstein's Evidence* § 803(2)[01] at 87 (1993), *McCormick On Evidence* § 297, at 704 (2d ed. 1972). There can be no question that the first of these requirements is met here. The captain's announcement of an "armed altercation," the two-hour delay in a filled-to-capacity jetliner guarded by armored security vehicles and a helicopter, and containment for another two hours in a makeshift waiting area under armed guard -- are events so unexpected and unusual that they surely qualify as "startling."

Second, Mr. Sakaria's statements were made while under the stress or excitement of these startling events. The court of appeals improperly dismissed Mr. Sakaria's statements because they were made to Mr. Bafitis upon Mr. Sakaria's arrival in Athens and not to anyone at the time of the incident in Rome. 8 F.3d at 173, App. at 15a. But Mr. Sakaria's

reaction should hardly be surprising. He had expected to land in Athens, but found himself, instead, in the aftermath of a terrorist attack in Rome. Individual reactions to crises of this nature would doubtless vary. The fact that Mr. Sakaria might not have communicated his fears until he burst out emotionally to his friend Mr. Bafitis, suggests that the trauma of the event had persisted up to his arrival in Athens. The length of time between the occurrence of an event and an excited utterance is not critical if the declarant remains in an excited state. *See McCormick On Evidence* § 297, at 706 ("Testimony that the declarant still appeared 'nervous' or 'distraught' and that there was a reasonable basis for continuing emotional upset will often suffice" (footnote omitted). *See also Morgan v. Foretich*, 846 F. 2d 941, 947 (4th Cir. 1988).

As the Eighth Circuit has stated: "The lapse of time between the startling event and the out-of-court statement, although relevant, is not dispositive in the application of rule 803(2) ... Other facts to consider include the age of the declarant, the physical and mental condition of the declarant, the characteristics of the event, and the subject matter of the statements." *United States v. Iron Shell*, 633 F. 2d 77, 85 (8th Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981).[6] In his excited state, Mr. Sakaria recounted the events at his first opportunity to relate them to someone he knew and trusted. *See Morgan*, 846 F. 2d at 947. The fact that Mr. Sakaria "told no one at that time" is not dispositive, given the catastrophic nature of the incident he had experienced. His statements fully satisfied the

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[6] *Cf. Harmony v. State*, 594 A. 2d 1182, 1189 (Md. App. 1991)("So long as the declarant, at the time of the utterance, was still in the throes of the 'exciting event' and therefore not capable of reflective thought, and sufficient foundation was laid to enable the trial court to reach this conclusion, the statement is ... admissible"); *Cole v. State*, 818 S.W. 2d 573, 575 (Ark. 1991)(statement by mentally retarded woman on day following rape incident admissible in view of victim's limited mental faculties and excited condition).

criteria of admissibility under Rule 803(2), and it was error for the lower court to reject Mr. Bafitis' affidavit as inadmissible hearsay.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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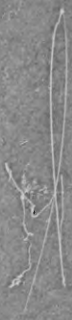
March 22, 1994



APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELPIS SAKARIA, individually and as personal representative of the Estate of Jagdish Sakaria, Deceased; ALEXANDER J. SAKARIA; RAJ J. SAKARIA; MARIA K. SAKARIA, Children of Jagdish Sakaria, Deceased. Plaintiffs-Appellants.	)	No. 92-1642
v.	)	
TRANS WORLD AIRLINES, Defendant-Appellee.	)	

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
M. J. Garbis, District Judge.
(CA-87-3462-MJG)

Argued: March 3, 1993
Decided: October 25, 1993

Before ERVIN, Chief Judge, PHILLIPS, Circuit Judge, and HILL, Senior Judge of the United States Court of Appeals for the Eleventh Circuit, sitting by designation.

Affirmed by published opinion. Judge Phillips wrote the opinion, in which Chief Judge Ervin and Senior Judge Hill joined.

COUNSEL

ARGUED: Nicholas Hamner Cobbs, LAW OFFICES OF NICHOLAS H. COBBS, Washington, D.C., for Appellants. John Niebrugge Romans, KATTEN, MUCHIN & ZAVIS, New York, New York, for Appellee. ON BRIEF: Nicholas Gilman, GILMAN, OLSON & PANGIA, Washington, D.C., for Appellants. Raymond L. Mariani, KATTEN, MUCHIN & ZAVIS, New York, New York, for Appellee.

OPINION

PHILLIPS, Circuit Judge:

Around a day and a half after completing his flight as passenger on a TWA international flight from New York to Athens, Greece, Jagdish Sakaria died of a heart attack. His widow and children (the Sakarias) brought this diversity action against TWA seeking damages for his death under Maryland wrongful death and survival statutes and, by later procedural developments, under the Warsaw Convention, alleging that the death occurred as a result of trauma occasioned by events associated with a terrorist attack in the Rome airport during the TWA flight's intermediate stop there. The district court dismissed all the claims by summary judgment. We affirm, though on reasoning independent of the district court's.

I

Jagdish Sakaria decided to visit his children, then attending school in Greece and living there with his wife's parents, in December of 1985. Acting on his behalf, Mrs. Sakaria contacted TWA and requested a nonstop flight from New York to Athens prior to Christmas. The TWA international ticketing agent told her no such flights were available. When asked when the next available flight was, the agent referred her to Flight 840, on December 26. Although TWA's timetable lists Flight 840 as having a scheduled stopover (without saying where), TWA's agent made no mention of that fact, and Mrs. Sakaria didn't inquire about it. To take advantage of a coupon, Mrs. Sakaria and her

husband purchased the ticket through a local travel agent later that same day. Neither ticket nor itinerary reflected the intermediate stop in Rome.

On December 26 Mr. Sakaria took Flight 840, and as it approached Rome's Fiumicino Airport on the morning of December 27, terrorists attacked the TWA ticket counter and embarkation area, leaving fourteen people dead and many others wounded. Consequently, Fiumicino flight control forbade Flight 840 to make its scheduled stop there, but when the plane was also denied permission to land at nearby Capino and its captain made clear that he lacked fuel to proceed further, Fiumicino flight control reconsidered and directed the plane to land and park on a remote section of the tarmac.

Once on the ground, the captain told his passengers of an "armed altercation" at the airport and warned them that the aircraft would be met by a security vehicle and held on the tarmac until it was safe to approach the terminal. One armored vehicle remained near the aircraft during this time, while another, together with a helicopter, patrolled at a distance. Within three or four minutes of landing the caption shut down the plane's engines and with them its air conditioning. Doors facing away from the terminal were opened for ventilation, but it became "close and warm" in the filled-to-capacity Boeing 747.

About two hours later, Flight 840's passengers were bussed to the terminal area and taken there to a makeshift waiting room. The terminal proper was sealed and patrolled by armed security personnel, though one passenger deposed that it would have been physically possible to leave the building housing their waiting room if the guards and their dogs had permitted it.

While in this waiting area, the passengers neither encountered terrorists, viewed the attack's aftermath, saw any bodies or attendant medical personnel, nor heard any sounds associated with the attack. In fact, those who deposed on the point perceived themselves to be in no danger at all. After about two hours in

the holding area, Flight 840's passengers including Sakaria were bussed to the plane continuing Flight 840's service to Athens. They left the way they came in, not through the terminal proper, where the terrorist attack had taken place. At no time during Flight 840 did any passenger seek medical attention. Flight 840 continued on to Athens, arriving without further incident.

A family friend, Nick Bafitis, met Mr. Sakaria at the airport. Mr. Sakaria looked pale, yellow, and "terrified," with black circles under his swollen eyes. He held his throat and neck and complained of thirst while recounting his experience in Rome in angry, excited tones.[1]

Mr. Sakaria travelled with Bafitis to a home in Athens. During an evening with the Bafitis family, Mr. Sakaria ate nothing because he felt as if eating would make him vomit.

The following day Bafitis drove Mr. Sakaria the seven hours from Athens to Volos, the remote village where his children resided with his wife's parents. During the trip Mr. Sakaria continued to refuse food but drank great quantities of liquids. He remained upset and broke out in tears while describing his experience in Rome.

In Volos, Mr. Sakaria sought unsuccessfully to change his return ticket to another airline before continuing on to his in-laws' house. While there, he still refused to eat and several times broke out in tears while describing events in Rome. He retired early, and the following morning Mrs. Sakaria's parents found Mr. Sakaria dead in his bed. An autopsy identified the cause of death

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1 The district court refused to consider the substance of these statements, as recounted in an affidavit executed by Bafitis, because it concluded that the statements were inadmissible hearsay. In the excluded portion of the statements allegedly made to Bafitis, Mr. Sakaria described "the shooting" and spoke of "seeing bodies and blood" when he went "upstairs to go to the bathroom."

as acute myocardial infarction or, in layman's terms, a major heart attack.[2]

The Sakarias then brought his federal diversity action, alleging state law survival and wrongful death claims against TWA. Two theories were advanced. First, the Sakarias alleged that TWA had breached a contract with Sakaria to fly him from New York to Athens nonstop. Had it not done so, it was alleged, he never would have experienced the trauma caused him by Flight 840's landing in Rome. Second, the Sakarias alleged that TWA negligently had breached the duty of care it owed Sakaria by permitting Flight 840 to stop in Rome despite TWA's awareness that a terrorist act had occurred there.[3]

In its answer, TWA denied it had contracted to fly Mr. Sakaria to Athens nonstop and denied any negligence. It also set up the Warsaw Convention,[4] as modified by the Montreal Agreement,[5] as an affirmative defense limiting its liability.

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2 The district court refused to consider the deposition testimony on causation of a cardiologist, Dr. Brandis Marsh, retained by Mrs. Sakaria in related insurance litigation because that testimony was based on the hearsay the court already had excluded concerning Mr. Sakaria's experience in Rome. Marsh opined that if Mr. Sakaria had been forced to spend an hour and a half on a closed plane without electricity before being expose to graphic evidence of the carnage caused by the terrorist attack, his heart attack could probably be said to have been "provoked by the circumstances" of Flight 840. He renounced that conclusion when presented with a scenario in which Mr. Sakaria neither saw the aftermath of the attack nor was exposed to a "stifling environment" on the plane. J.A. 616-620.

3 The negligence theory later firmed up as an allegation that TWA failed to comply with federal aircraft fueling requirements that would have given Flight 840 sufficient fuel to avoid landing in Rome.

4 Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted at* 49 U.S.C. app. § 1502 note (1988).

5 Agreement Relating to Liability Limitations of the Warsaw Convention and Hague Protocol, Agreement CAB 18900, Approved by Executive Order E-23680, May 13, 1966 (Docket 17325) (1966), reprinted in Civil Aeronautics Board, Aeronautical Statutes and Related Material 515-16 (1974).

Following discovery, TWA sought summary judgment on all claims, contending that the causation element essential to each was unsupported by an admissible evidence because Mr. Sakaria's statements to Bafitis were inadmissible hearsay and the Sakarias' medical expert predicated his essential causation opinion on that hearsay. In addition, TWA submitted the deposition of a neurosurgeon, Spiridon Koulouris, who had examined Mr. Sakaria over the course of several years following a 1978 automobile accident that concededly had impaired his memory and left him permanently disabled from his job as an econometrician. Koulouris deposed that Mr. Sakaria heard non-existent noises and was subject to hallucinations and confabulations.[6] In response to TWA's motion for summary judgment, the Sakarias submitted the Bafitis affidavit and another affidavit by Ayub Onmaya, a neurosurgeon who had examined Mr. Sakaria twice following his 1978 accident, both times before Koulouris began his four to six year interaction with Mr. Sakaria. Bafitis stated by affidavit that Mr. Sakaria's automobile accident had affected his memory but that he "had never known [Mr. Sakaria] to fabricate stories or to invent accounts of things that never happened." Onmaya opined that based on his diagnosis of Mr. Sakaria's condition "it [was] highly unlikely that Mr. Sakaria experienced delusions, hallucinations, or confabulations ont he date of the [terrorist] incident" and concluded "to a reasonable degree of medical certainty" that "Mr. Sakaria's experience was based on reality."

The district court referred the case to a magistrate judge, who concluded that "[t]he overwhelming evidence in this case indicates that the events at issue did not occur as [Mrs. Sakaria] contends" and recommended that summary judgment for TWA be granted. In reaching this conclusion, the magistrate judge refused to consider the alleged statements by Mr. Sakaria recounted in the Bafitis affidavit, concluding that they were "uncorroborated

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6 "Confabulation" is the "recitation of imaginary experiences to fill gaps in memory." B. Miller & C. Keane, *Encyclopedia and Dictionary of Medicine, Nursing, and Allied Health* (3d ed. 1983). Dr. Koulouris described it as "generating or reporting nonexistent situations, either totally nonexistent or mixed with real events."

hearsay ... bearing no guarantees of trustworthiness." She also denied the parties a hearing and recommended rejection of the Sakarias' request for additional discovery and leave to amend their complaint to state expressly a cause of action under the Warsaw Convention.

The Sakarias objected to the magistrate judge's report, including its refusal to consider a Warsaw Convention claim, and requested a hearing. TWA countered their objections and opposed the hearing. The district court granted summary judgment to TWA after denying oral argument on the grounds that it "would not assist the court in understanding, or deciding, the issues presented." Essentially adopting the magistrate judge's recommendations, the court concluded that on the material facts not genuinely in issue, the Sakarias' state law wrongful death and survival claims failed as a matter of law. The specific contract breach alleged, of failure to fly non-stop to Athens, did not occur; TWA flew Mr. Sakaria exactly as scheduled, to Athens with an intermediate stop at Rome. There was no negligence in not having enough fuel to overfly Tome, because that was a scheduled stop. Furthermore, even if contract breach and/or negligence were assumed, neither as a matter of law on the undisputed facts of record, could be found a reasonably foreseeable cause of Mr. Sakaria's death. As to the possibility of liability under the Warsaw Convention, which the magistrate judge had declined to consider because not expressly pleaded by the Sakarias, the court held that it need not discuss" whether the claim was before it, concluding summarily that on the record before it, no such claim could be established in any event.

This appeal followed.

II

For reasons that soon will be apparent, we need first to determine whether at the time TWA's summary judgment motion was ruled upon, the Sakarias were entitled to have it considered that their action included a Warsaw Convention claim in addition

to the expressly pleaded state-law wrongful death and survival claims. As indicated, the magistrate judge declined to consider that such a claim was in the case, because the Sakarias had not expressly pleaded it, or to allow it to be added by amendment as the Sakarias sought to do if it were considered necessary. And, as indicated, the district court then essentially finessed the question, holding summarily that even if it were in the case, it failed on the merits.

Of course the claim should have been considered to be in the case at that point -- either because sufficiently well-pleaded as was, or because, if it were thought needful for whatever reason to have it expressly pleaded, the proffered amendment should have been allowed in a proper exercise of discretion. Indeed, TWA does not contest its consideration on this appeal.

The point does not require great discussion. Maybe even before, but certainly after TWA raised the Warsaw Convention as a limitation on its liability, every purpose of notice pleading had been served.[7] If an express pleading of the claim was then thought necessary for *res judicata* or other purposes, it should have been allowed as a matter of course. At that point TWA had itself invoked the Convention (though for damage limitation purposes) signalling that it was prepared to defend against such a claim. It therefore was obvious that no prejudice to TWA or delay in

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7 The confusion here undoubtedly stemmed -- though it need not have, *see Fed. R. Civ. P.* 8(e)(2) (alternative, inconsistent claims and defenses allowable) -- from the still not fully certain interplay between state-law claims and the federal claim created by the Warsaw Convention respecting harms occurring during international air transportation. See Part IV, *supra*. The Sakarias' failure to proceed initially, as they could have, on expressly pleaded alternative claims created a tactical problem for TWA, which it properly resolved by raising the Warsaw Convention's limitation on liability as an alternative defense available if that not yet expressly pleaded claim rather than any of the state-law claims were to be established. Primary fault for the resulting confusion can thus rightly be laid to the Sakarias, who only belatedly sought to get on the alternative track. That, however, should not have prevented the modest, non-prejudicial retrieval of the situation that they then sought, *see Fed. R. Civ. P.* 1, a point the district court apparently recognized by addressing the claim, though summarily, on an "assuming-it's-in-the-case" basis.

the process would result. In those circumstances, the command of *Fed. R. Civ. P.* 15(a) that leave to amend should be "freely given when justice so requires" should have been followed -- if that were thought a necessary condition to having the claim considered on the merits.

We therefore hold that the Sakarias were entitled to have their proffered Warsaw Convention claim considered on the merits in the district court's ruling on TWA's motion for summary judgment. This means in turn that, reviewing that ruling *de novo*, we too must consider the claim on its merits.

III

Before getting to the merits of any of the claims, however, we have to deal with one other procedural point.

The Sakarias contend that vacatur and remand is required because of the refusal of both the magistrate judge and the district judge to afford them an opportunity for oral hearing on TWA's motion for summary judgment. This, they contend, was an abuse of discretion requiring vacatur and remand. We disagree.

While the importance of oral advocacy in general must of course be recognized, it is our rule that there is "no absolute requirement that a ruling on a motion for summary judgment be preceded by a[n oral] hearing." *Langham-Hill Petroleum, Inc. v. Southern Fuels Co.*, 813 F.2d 1327, 1330 (4th Cir. 1987). The Sakarias contend, however, that in some situations the complexity of issues may be such that the refusal to afford an oral hearing is an abuse of discretion, and that this is such a case. They rely principally on *In re Paoli R.R. Yard PCB Litigation*, 916 F.2d 829, 854 (3d Cir. 1990), in which the Third Circuit found such an abuse. We may accept that such cases can exist, and that *Paoli* properly identified one, but we don't believe this one qualifies.

Paoli was a thirty-eight plaintiff mass tort action against a railroad alleging multiple-party injuries from PCB exposure; this

is essentially a two-party lawsuit in which damages are sought for the death of one person. The need for oral testimony in *Paoli* was thought to arise from the complexity and volume of expert testimony related to the levels of toxic exposure involved and to the causal link between that exposure and the many plaintiffs' injuries. The resulting difficulty was compounded by discovery limitations that curtailed plaintiffs' ability to challenge the critical opinions of defense experts except by written and oral advocacy.

This case has neither of those critical features. The Sakarias had had ample opportunity to cross-examine for the record all of TWA's causation experts. They'd not been prevented from developing their own expert opinion evidence on causation, nor such lay testimony by fellow-passengers as they desired. They'd had ample opportunity to resist summary judgment by written arguments.

The resulting summary judgment record was thus a fairly developed and argued one. It could not have been added to substantively by oral argument. And while, as probably is always the case to some extent, oral advocacy may have been able to present the Sakarias' position somewhat more forcefully, the issues raised were not -- unlike those in *Paoli* -- such that they could only fairly be presented by oral argument.

We therefore conclude that the district court did not abuse its discretion in declining to conduct an oral hearing before ruling on TWA's motion for summary judgment.

IV

Turning to the merits, we first consider the Sakarias' Warsaw Convention claim. Article 17 of the Warsaw Convention provides that in respect of international air transportation

> [t]he carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident

> which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

It is now settled that this treaty provision provides an independent federal cause of action in situations where it applies. *Benjamins v. British European Airways*, 572 F.2d 913, 919 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). As do federal common law tort claims generally, it survives the death of the victim despite the absence of a specific statutory command to that effect. *In re Mexico City Aircrash of October 31, 179*, 708 F.2d 400, 415 (9th Cir. 1983); *see Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

There is then the question of the nature of the claim and of its applicability to the facts of this case, as developed in the summary judgment record. As interpreted by the courts, the claim created is one of strict, but limited, liability, the one having been traded off for the other in the treaty negotiation process. *See In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1271 (2d Cir.) *cert. denied*, 112 S.Ct. 331 (1991). In addition to the international flight predicate, the essential elements of the claim are thus (1) an "accident," that (2) "took place on board the aircraft or in the course of any of the operations of embarking or disembarking," and that (3) "caused" the death, wounding or other bodily injury of a passenger. By judicial interpretation, "accident" refers to the cause of injury rather than the injury itself, and consists of "an unexpected or unusual event or happening that is external to the passengers." *Air France v. Saks*, 470 U.S. 392, 405 (1984), a definition that excludes injuries resulting from "a passenger's own internal reaction to the usual, normal, and expected operation of aircraft." *Id.* at 406.

To some extent, each of these elements of the claim is the subject of dispute on this appeal. As to the first -- whether an "accident" occurred -- the Sakarias identify two events that they contend either independently or in combination qualify: Mr. Sakaria's hour-and-a-half to two hour confinement in the

unairconditioned aircraft while under the emotional stress of knowing that it was caused by "an altercation" in the terminal requiring security precautions and his later exposure to the sight of the covered bodies of persons killed in the terrorist attack.

As to the first of these events, the prolonged confinement in the aircraft, TWA contends that as a matter of law it is not the type of unusual or unexpected event or happening that is considered an "accident" within the meaning of Article 17 of the Warsaw Convention. As to the second, the alleged sighting of the terrorist attack's aftermath, TWA has two basic contentions: the proffered evidence of its occurrence was properly disregarded as inadmissible hearsay, and in any event was too shaky and questionable to raise a genuine issue of fact, and, alternatively, if the sighting did occur as alleged, it could only have done so by conduct of Sakaria that took him outside the process of "disembarkation," hence outside the temporal/spatial "on-board, etc." limitation imposed by the claim's second element.

As to the causation element, the parties essentially dispute the admissibility, and, even if admissible, adequacy of the Sakarias' causation evidence to raise a genuine issue. TWA says that the only such evidence proffered other than that of the temporal sequence of flight and death, was that of Dr. Marsh, whose causation opinion concededly was based on the rightly excluded evidence of Sakaria's alleged account to Bafitis, hence was inadequate to raise a genuine issue. On this basis, TWA contends (by necessary implication) that even if either or both the events relied on by the Sakarias as Warsaw Convention "accidents" qualify as such, the inadequacy of the proffered evidence of proximate causation between those "accidents" and Sakaria's death entitled it to judgment as a matter of law.

These conflicting contentions raise legal issues concerning the Warsaw Convention's coverage that are ones of first impression in this circuit. Regrettably, as indicated, the magistrate judge did not address them at all, and the district court, only contingently

and cursorily.[8] Though they properly should have been more fully considered by the district court whose judgment of dismissal we review, our review is *de novo, Atlas Machine and Iron Works, Inc. v. Bethlehem Steel Corp.*, 986 F.2d 709, 712 (4th Cir. 1993), hence not limited to the scope of that court's consideration.

On the basis of our independent review of the summary judgment record and our consideration of the written and oral arguments of counsel on this appeal, we have concluded that the Warsaw Convention claim was properly dismissed by summary judgment.

First off, we think the district court properly declined to consider as part of the summary judgment record the substance of the statements ascribed to Mr. Sakaria in the Bafitis affidavit. To be entitled to consideration on summary judgment motions, facts set forth in affidavits must be "such ... as would be admissible in advance." *Fed. R. Civ. P.* 56(e). The substance of the Sakaria account in the Bafitis affidavit was of course hearsay whose admission obviously would have affected a substantial right of TWA, *see Fed. R. Evid.* 103(a), so that its admissibility as evidence depended upon bringing it within one of the specific or the residual exception to the hearsay rule. On this appeal, the Sakarias assign as error the district court's refusal to find this proffered evidence admissible under the "excited utterance"

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8 While asserting that there were "several" bases for concluding that any Warsaw Convention claim in the case could not be established, the court expressly identified only one as "obvious" and sufficient. This, apparently, was that without benefit of Sakaria's alleged accounts of the events in Rome, it could not be established that he was "injured on board the airplane or in the course of any operation of embarking or disembarking the airplane or in the course of any operation of embarking or disembarking," which the court understood to be required by the Convention. J.A. 18. It's not possible to tell from this just what deficiency was being identified. The requirement is not that "injury" shall have occurred "on board ... or in the course ...", but that the causal "accident" shall have occurred then and there. Whether this involved misapprehension on this critical point is not clear but is irrelevant to our *de novo* review.

exception of Fed. R. Evid. 803(2).[9] We find no error in that ruling.

Rule 803(2) excepts from the hearsay rule statements relating to a startling event or condition while the declarant was under the stress of excitement caused by the event or condition. The theory of course is that the state of excitement prompted by such events sufficiently guarantees unreflective spontaneity in hearsay statements describing the events to supply the internal trustworthiness that cross-examination is not available to test. *See generally* McCormick on Evidence, § 272 (4th ed. 1992). There are any number of reasons why this generally valid theory of trustworthiness by virtue of excited spontaneity may be found unsupported in particular cases.[10] We think several were present here that warranted refusal to apply the exception. Foremost was the evidence before the court -- uncontradicted in its essence, though challenged in some details -- that since a mentally incapacitating illness in 1978, Mr. Sakaria had been subject to hallucinatory misperceptions of reality in precisely the sort of situation that developed here. His wife, for example, conceded in deposition that upon viewing television reports of the Iran-Iraq war, he imagined himself to be threatened by the far away events being depicted. J.A. 192-197. The possibility that hallucination rather than spontaneity may have drive Sakaria's alleged account of events in Rome, no matter how excitedly given, was strengthened

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9 The Sakarias also suggested that there might be "other exceptions" that warranted admission -- presumably the "present sense impression" exception of Rule 803(1) and the "residual exception" of Rule 803(24). But they have only argued specifically for the "excited utterance" exception on this appeal, and although the district court ruled out both those other exceptions, we don't discuss them beyond noting that if the "excited utterance" exception doesn't apply here, neither would those others.

10 Mainly because a too-long lapse of time is thought to have permitted excitement to die allowing reflection or fabrication to take over. *See, e.g., Morgan v. Foretich*, 846 F.2d 941 (4th Cir. 1988). But even where deliberate fabrication is not likely -- as certainly is the case here -- there may well be other reasons to find spontaneity, even if maintained in the interval, not a sufficient safeguard against *inaccuracy*.

by other indications in the record. Despite full opportunity to develop corroborating evidence of Sakaria's having seen any of the immediate results of the terrorist attack in the Rome airport, none was presented. From the absence of any such obviously vital corroboration of Sakaria's alleged account, the district court was entitled to assume that no other passenger to have left the waiting room in which all were told to stay; and that Sakaria told no one at that time -- when his excitement presumably would have been at its height -- about having had any such experience. Confronted with this situation, the district court was amply justified in declining to consider this highly questionable hearsay account going to so critical an issue but lacking a shred of corroboration of its trustworthiness.

With this account of the sighting of attack victims out of the picture as an "accident" causing Sakaria's death,[11] we are left with the period of uncomfortable confinement in the aircraft by one knowing that it was caused by an "altercation" that justified visible security precautions. Whether this "event or happening" considered in isolation could be held as a matter of law to be so "unusual or unexpected" in international air transportation as to constitute an "accident" under the *Saks* definition raises interesting questions by no means easy to resolve.[12] We need not make the effort, for we hold that even if it were, the summary judgment record does not present a genuine issue of material fact as to the required link of causation between that event and Sakaria's death. As earlier indicated, the only evidence proffered in support of the

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11 This avoids any necessity to deal with TWA's alternative contention that even if the account of this event were considered, it could not be found an "accident" because, by Sakaria's own purported account, it occurred while he wasn't "embarking or disembarking" but had taken himself out of TWA's control. *See Day v. TWA*, 528 F.2d 31 (2d Cir. 1976) (carrier control over passenger a factor in assessing whether passenger engaged in process of embarking or disembarking).

12 Among them: whether in assessing the "usual or unusual" character of this "event," the terrorist attack, which didn't "take place on board," should nevertheless be considered a part of that event; whether, if not, the prolonged wait itself was no "unusual or unexpected" an event (whatever its immediate cause) in contemporary air travel, as to constitute an "accident" under *Saks*.

required causation, aside from the raw temporal sequence of the two events, was the deposition testimony of the Sakarias' medical expert, Marsh. His original opinion that the totality of the event as allegedly recounted by Sakaria to Bafitis probably provoked the heart attack was effectively renounced once the possible cause was limited to the prolonged wait in the aircraft. J.A. 616-620. Maybe even in its original form, and certainly in its final, Marsh's testimony on this issue would not suffice under our standard to support the requisite finding of causation, as to which the Sakarias of course had the burden of proof. In a long line of decisions in this circuit, we have emphasized that proof of causation must be such as to suggest "probability" rather than mere "possibility," precisely to guard against raw speculation by the fact-finder. *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 241-42 (4th Cir. 1982) (motivation in ADEA case); *Wratchford v. S.J. Groves & Sons, Co.*, 405 F.2d 1061, 1066 (4th Cir. 1969) (cause of personal injury); *Ford Motor Co. v. McDavid*, 259 F.2d 261, 266 (4th Cir. 1958) (cause in products liability case); *Ralston Purina Co. v. Edmunds*, 241 F.2d 164, 168 (4th Cir. 1957) (same). Where, as here, resolution of the causation issue is dependent upon expert opinion testimony, it must meet that standard, and Dr. Marsh's revised opinion testimony, when based upon the only admissible evidence of "accident" in the summary judgment record, *see Newman v. Hy-Way Heat Systems, Inc.*, 789 F.2d 269 270 (4th Cir. 1986), does not do so.

Accordingly, we affirm dismissal of the Warsaw Convention claim by summary judgment.

*

Turning to the state-law survival and wrong death claims, we first note our assumption, without deciding the issue, that they are not preempted by the Warsaw Convention claim. While it has been held that where the Warsaw Convention claim provides a remedy, the remedy is exclusive of any others, *see In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267, 1275 (2d Cir.) *cert. denied*, 112 S.Ct. 331 (1991), the Supreme Court has

reserved decision on whether the scope of exclusivity might be even wider than that of liability. *See Saks v. Air France*, 470 U.S. at 408. As indicated, without deciding the issue, we can assume for purposes of this case that, at least where the Warsaw Convention claim has been found not available, parallel state-law claims such as those here in issue are not preempted.

Addressing those claims here, we affirm their dismissals by summary judgment. The reasons are plain, as given by the district court. As to the negligence theory advanced under both the wrongful death and survival claims, even if TWA were negligent somehow is failing to provide enough fuel to fly past Rome, the evidence would not support a finding or proximate causation between that negligence and Sakaria's death. The evidence founders not only for the same reason that the Warsaw Convention claim foundered for insufficiency of proof of causation between the Rome law-over events and Sakaria's death, but for additional infirmities related to the even more attenuated link back to TWA's alleged act of culpability in fueling the flight.

The same infirmity defeats the contract claim,[13] though here through the ancient parallel foreseeability principle of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1954). Even if there were a contract breach in stopping over in Rome, the risk that Mr. Sakaria's death would somehow be caused by that event in conjunction with a terrorist attack at that very time is obviously far too remote to allow recovery in contract.

AFFIRMED

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13 There could be another infirmity in the "contract" theory in the wrongful death claim. The general rule is that breach of contract claims don't lie under wrongful death statutes, that those statutes contemplate only tort as a basis for liability. *See* Prosser and Keeton on *Torts*, § 127. We need not address whether that is the rule in Maryland in view of our disposition on other grounds.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 22, 1993

No. 92-1642
CA-87-3462-MJG

ELPIS SAKARIA, individually and as personal representative of the Estate of Jagdish Sakaria, Deceased; ALEXANDER J. SAKARIA; RAJ J. SAKARIA; MARIA K. SAKARIA, Children of Jagdish Sakaria, Deceased
Plaintiffs - Appellants

v.

TRANS WORLD AIRLINES
Defendant - Appellee

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

December 23, 1988

William F. Huffman
316 Hannes Street
Silver Spring, Maryland 20901

Dear Mr. Huffman:

I am pleased to respond to your letter of December 12, 1988, referable to Jagdish Babu Sakaria. For the sake of the record it may be appropriate to inventory the documents I have seen. These include your letter, a translation of the "Forensic Report of Necropsy and Necrotomy," records from Dr. R. Simon dated 20 July 1987 and September 25, 1985, and statements from a Mr. Bafitis (August 9, 1986), and Labros Stamoulis (August 9, 1986).

In brief summary, Mr. Sakaria apparently was a 49 year old who was forced to spend one and one half hours in a closed plane which apparently had no electrical supply at the Rome airport in December of 1985. This delay was caused by a terrorist bombing at the Rome airport. When the patient was finally permitted to disembark from his plane he had to walk through the airport where he saw rather graphic evidence of the carnage caused by the bombing. The issue at hand relates to whether the occurrence of his lethal heart attack was "accidental".

Unfortunately, the post mortem report is not adequately detailed to permit a more precise estimate of the time of the infarction to be made. In turn, we must rely on other information. In this respect. I am particularly impressed by the statement of Mr. Bafitis. His description of the appearance of Mr. Sakaria when the later deplaned in Athens is wholly consistent with the appearance of a patient who has sustained recently an acute myocardial infarction. Mr. Bafitis reports that Mr. Sakaria complained of discomfort in his throat, described as a sense of dryness. While it is more characteristic for patients to complain of discomfort or pain, the nature of that discomfort sometimes is very difficult for them to describe specifically, and this would not be the first time

I have heard it called "dryness". Obviously, during the flight from Rome to Athens, Mr. Sakaria would have had the opportunity to quench his thirst if the "dryness" had simply been dryness. Equally clearly, his throat continued to bother him. I find the observations of Mr. Bafitis and the complaints of symptoms referable to the throat compelling, given the presence of a grossly evident heart attack on the post mortem. While I obviously cannot make a diagnosis with absolute confidence, I believe, to a reasonable degree of medical certainty, this patient sustained an infarction at some time between his arrival in Rome and his arrival in Athens.

Let me add an additional observation based on personal experience rather than on medical training. For various reasons, I have had occasion previously in my life to spend time in a commercial aircraft parked in full sun light on a runway when airconditioning and air circulation systems were inoperative. The experience was an exceedingly unpleasant and stressful one. I have no doubt that the stress generated by confinement under those circumstances could have severe adverse implications in a patient predisposed for some reason to a heart attack. The additional stress of being exposed to the aftermath of the terrorist attack in the airport would, of course, contribute further to that stress. The circumstances described plausibly could cause either a fracture of a preexisting coronary lesion with secondary occlusion or primary coronary spasm with occlusion and infarction.

In summary, therefore, I find the evidence more than adequate to come to a conclusion that the patient died as a result of a rhythm disorder caused by a myocardial infarction provoked by the circumstances of travel. I believe those statements can be made to a reasonable degree of medical certainty. In turn, I would infer, within my understanding of the meaning of the word, that this death was "accidental".

I trust the above comments are adequately clear. If further discussion is necessary, please let me know.

Sincerely,

/s/ H. Brandis Marsh, MD
H. Brandis Marsh, M.D.

HBM:kaw

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

ELPIS SAKARIA	:	
Plaintiff	:	
vs.	:	HM-87-3302
ALLSTATE LIFE INSURANCE CO.	:	
Defendant	:	

Friday, June 16, 1989
Washington, D.C.

Deposition of:

H. BRANDIS MARSH, M.D.

was called for examination by counsel for the defendant at the Washington Hospital Center, 106 Irving Street, N.W., Washington, D.C., commencing 10:00 a.m., before Elvia Faye Grant a notary public for the District of Columbia.

* * *

EXAMINATION BY [DEFENDANT'S COUNSEL]:

* * *

Q. Did you in arriving at your opinions in your report rely in any way in what is contained in this statement of Mr. Bafitis?

A. I sincerely thought that the description of the gentleman's appearance strongly supported the presumption that he had already sustained the heart attack or was in the process of sustaining the heart attack at that point. I think that I found that

quite useful. Whether necessary or not is a different issue, but certainly it added to the components of the situation.

Q. Have you ever talked to Mr. Bafitis?

A. No, sir.

Q. You would have no way of knowing whether this statement in fact fairly represents what he may have said to whoever the unidentified transcriber was; is that correct?

A. I would have no way of knowing.

* * *

Q. If you learned that in fact M. Sakaria never heard any hand grenades, never saw r heard of any automatic guns, never saw any bodies, never saw any blood, and in fact all of that was untrue, would that affect any opinion you've given based on anything Mr. Sakaria had said to anyone?

A. Yes. If that was all untrue, I think, clearly that could change one's opinion. Sure.

Q. Would that reduce your comfort level, if you will, of your opinion to a degree of less than medical certainty?

A. Again, I guess I would have to have your specific hypothetical to be entirely comfortable in responding to that question. I don't think I read it then and I don't read it now as implying that he made a statement that he was exposed to gunfire and grenades and necessarily heard them. I would read this as simply implying that he was aware of what the terrorists had, not necessarily that he was directly exposed.

I read it to imply that he saw bodies. He saw blood. He saw damage in the airport. Yes. If that turned out not to be true and if it turned out not to be true that he really was kept on

an airplane for an hour and a half in an uncomfortable environment et cetera, et cetera, yeah, I don't think I could make the same conclusion at that point.

* * *

Q. Let me suggest this scenario to you. He's on an airplane 30 minutes away from the airport when the shooting is all over. He has another 30 minutes of lying, if you will, to get to the airport. He sits in a plane for an hour or an hour and a half. He never sees the carnage. He never sees any bodies. He never sees any blood. He's not even taken through the area where the incident occurred. He hears no shooting. He hears no grenades -- no nothing. He's then put on another plane and goes to Athens. Does that affect any -- And let's assume that scenario is correct. Does that affect any of the opinions that you have given in your letter?

A. Again, let me add one additional presumption, which I think is in the spirit of your question; and that is that that hour and a half on the runway is not one characterized by a heat stifling environment et cetera, et cetera.

Q. Yes. Let's assume that's true. And let's add that the mood on the plane was quiet and calm.

A. Yes. That hypothetical would clearly lead me to a very different opinion.

Q. And to an opinion sufficiently different that you would no longer subscribe to the opinion in your letter of December 23, 1988?

A. I think that's a fair statement. Yes. Now, to be sure that answer is clear: I would not subscribe to the opinion expressed in that letter.

Q. Right. Well, it's fair to say this. I mean, your opinion was based on what you understand the various facts to be?

A. Yes, sir.

Q. And that was, in turn, based on the documents provided to you by Mr. Huffman's letter?

A. Yes, sir.

Q. Have you ever read any reports or medical notes or anything from a Dr. Koularis relating to Mr. Sakaria?

A. Not knowingly. Again, if the documents are not here I have not seen them.

* * *

There is one additional aspect that I think that I did not refer to in my letter that I should have and that I noticed in going through the records today. I have to temper that somewhat. The letter that you referred to in French that we have an English translation in longhand at the bottom, if it's accepted as being a clearly dependable piece of information, carries the statement -- and, obviously, I read from the translation and not from the French -- "The coronary arteries had a normal appearance on macroscopic examination."

I one accepts that observation as being accurate, which is to say that the coronary arteries were examined in adequate detail to make the conclusion that is stated, then we have a situation which becomes somewhat less unusual. Most patients who have heart attacks or myocardial infarctions have areas of blood vessels of coronary artery that are narrowed significantly and, in turn, clot that blood vessel in a location related to one of these areas of abnormality. The clot cuts off blood flow and the heart muscle dies; that's the process of heart attack.

In the absence of plague and the absence of a clot, a heart attack occurs because of spasm. We know that that happens in some small percentage of patients. Because the wall of the blood vessel is muscle the wall can contract and the vessel can close off as if it were having a charley horse, and we know also that that can cause heart attacks. The importance of the distinction is that it takes a much greater level, shall we say, of unusual event to cause that kind of a sequence. And it becomes, in turn, at least in my view, that there's much more of a support of the presumption that the occurrence of this heart attack occurred because of the unusual circumstances of this trip. I think that to me at least would support -- would add additional substance nd credence to the presumption.

Q. Would it be fair to say that in the conditions, which you have just described were sudden significant events, cause this charley horse, if you will, affect?

A. Yes.

Q. Could that be induced in one's own mind as opposed to actually having seen and heard certain things?

A. Certainly.

Q. So, would it be possible that in fact even if he didn't see any of this or hear any of this or have any of the experience which has been described in the statements, he could have induced it on himself through his own mind?

A. I think you could argue plausibly that that sequence could occur.

Q. And in your view would that be an accidental death?

A. Well, I think, if the reason that it occurred in his mind had to do with exposure to, again, events of this kind or knowledge

or et cetera, then that's the elements of random chance and of accident. It's still the inducing principle.

EXAMINATION BY [PLAINTIFFS' COUNSEL]:

* * *

Q. From the report of Mr. Bafitis of the substantial change in color of Mr. Sakaria's face and his eyes and his grasping at his throat, are those indications of trauma having occurred?

A. I'm not sure that I follow what you mean by the word trauma. In that situation there are things that people can do when they have been exposed to a substantial level of stress at one time or another. There are things that I think are wholly consistent with the expected behavior of a patient who has recently sustained a heart attack for whatever the cause of the heart attack.

Q. That's what I'm arriving at, Doctor.

A. If you mean trauma to the heart in the form of a heart attack then I will say, yes, absolutely.

Q. What's your definition of an experienced traveler?

A. Well, I would assume what we're talking about is a businessman who has to travel regularly on business, and for that purpose I suppose we would assume a minimum of four to five extended trips a year and probably more like once a month or something on that order.

Q. So, would you agree that a person that takes one trip a year or one every two years is not really an experienced traveler?

A. I would not think of him as being an experienced traveler. No, sir.

Q. So, a nonexperienced traveler involved in an unexpected or unplanned stopover anywhere, would that cause any stress?

A. It certainly could. Yes, sir.

Q. Did you know that his stopover in Rome was unexpected?

A. I inferred from the documents that he was in Rome longer than he had expected to be. I have assumed that his original travel plans required that he stop in Rome but, presumably, under different circumstances, whether a continuing flight or a change of planes or whatever. But, I have assumed that the documents implied a longer than expected stopover. In any event, a stopover that was substantially different in character from what one would normally expect.

Q. Well, if you were to know that the stopover was entirely unplanned, at least from his standpoint, and a change of planes was entirely unplanned, would this have caused him or anybody else any uneasiness or stress?

A. Yes, I think it would.

Q. Is it your opinion then, Dr. Marsh, that this heart attack and subsequent death was caused by some sort of trauma?

A. Yes, sir.

Q. And lacking anything that happened in Athens r on route to the little town of his wife's parents, is it safe to assume the trauma, if any, must have occurred during his transit in the plane?

A. Yes, sir.

Q. So, assuming then that there was trauma f some sort during the period of travel, is it your pinion then that whatever happened which caused his death was an accident?

A. I think it was. Yes, sir. Making those assumptions.

MR. HUFFMAN: No further questions.

FURTHER EXAMINATION BY [DEFENDANT'S COUNSEL]:

Q. Let me go back over that. Could the events which caused the hart attack, in which you say there was trauma which caused the heart attack and death, could that trauma have occurred before he got on the plane?

A. I suppose it could have, but I think it's very unlikely. Again, I have some difficulty in being precise because you have raised questions about whether my presumptions of time intervals have been entirely fair. And the actual time intervals have some bearing on the issue of when these different events plausibly could have occurred.

Q. So, the traumatic event, if there was one, could have occurred before he got on the plane that took him to Rome?

A. Conceivably. You know, again, I don't think it's likely but it's conceivable.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ELPIS SAKARIA, et al.,	:	
	:	
Plaintiffs,	:	
-against-	:	Civil Action No.
	:	MJG-87-3462
TRANS WORLD	:	
AIRLINES, INC.	:	
	:	
Defendant	:	

NICHOLAS M. BAFITIS deposes as follows:

1. I reside at 4915 Lincoln Avenue, Beltsville, Maryland. I am a close family friend of Elpis Sakaria and the other plaintiffs in this action. I was also a close friend of the decedent, Jagdish Sakaria. I am the godfather of Mr. Sakaria's son, Alexander. Although I speak a little English, I am not fluent in English. My conversations with Mr. Sakaria and his wife normally were in Greek.

2. On December 27, 1985 I was in Greece with my family, visiting my daughter, who was staying in Greece at the time. On the afternoon of December 27 I met Mr. Sakaria at the airport in Athens. His wife, Elpis Sakaria, had made arrangements for me to meet her husband before I left the United States on December 21.

3. When I arrived at the airport I was told that Mr. Sakaria's flight was delayed. I was surprised to discover that his flight had stopped in Rome. I knew that Mr. Sakaria always took nonstop flights and avoided flights with intermediate stops or transfers if he possibly could. I assumed the reason he flew out of New York, rather than Washington, D.C., was so he could get a nonstop flight.

4. When Mr. Sakaria's flight arrived I observed that many of the passengers coming out of the customs area were talking excitedly about unusual things happening in Rome. When Mr. Sakaria came out, I could tell immediately that something had happened to him. He looked extremely pale and yellow, with black circles under his eyes. His eyes were swollen and seemed to glare. He was holding on to his throat and neck. He looked terrified.

5. As soon as Mr. Sakaria recognized me he started talking in Greek about the events in Rome. The first thing he said was: "Did you hear what happened to us in Rome." He described the shooting and talked about talked about [sic] seeing bodies and blood. His tone was extremely excited. He also said he was extremely thirsty because the airplane had been parked on the field for a long time with the air conditioning off. He said it had been "suffocating."

6. I asked Mr. Sakaria why he had landed in Rome rather than taking a direct flight. He became very angry. He said he didn't intend to land in Rome and that his flight was supposed to be a nonstop flight.

7. Mr. Sakaria kept saying: "What was I doing in Rome?" He wanted to call his wife immediately. I persuaded him to wait until we got to my mother's house, in Athens, where I was staying with my family. When we got there I placed the call to Mrs. Sakaria and gave her a brief account of how he had landed in Rome. She was incredulous. She told me she had booked Mr. Sakaria on a nonstop flight to Athens. Mr. Sakaria then talked to his wife excitedly about how he had landed in Rome and how terrible things had happened there. I urged Mr. Sakaria to calm down and persuaded him to come join the family in the dining room for dinner.

8. Mr. Sakaria refused to eat any food for dinner. He told the family he could not eat without throwing up. At this point my father asked: "Did all this take place right in front of you."

He used the plural form of "you," referring to all of the passengers. Mr. Sakaria replied: "No, but I saw it all when I went to the bathroom upstairs to the other floor. And then, when I saw the bodies and the blood, I vomited." The following day he again talked about how he had seen the bodies when he went upstairs to go to the bathroom. He was asked by one of his nephews if he could tell whether any of the bodies were Greek persons. He replied emotionally that the bodies were "covered up" but that they were "human." (As a result of an automobile accident in 1978 Mr. Sakaria had problems with control of his bowels and bladder and could not wait if he needed to go to the bathroom.)

9. Although the family attempted to change the conversation many times, Mr. Sakaria insisted on talking about the events in Rome. He repeatedly thanked God that he was alive. He exclaimed: "You cannot understand what bodies and what blood I saw!"

10. Mr. Sakaria related that the Captain had told the passengers that there was fighting in the airport. Immediately Mr. Sakaria became nervous and his throat became dry. He said the airplane was then parked on the field and the air conditioning was shut off. Although they opened three doors for ventilation, it was hot and "suffocating" inside the airplane. Mr. Sakaria said he got up and walked to one of the open doors to get air. He saw an armored vehicle there and soldiers with machine guns and hand grenades. He was extremely frightened because he thought they might be going to attack the plane. Mr. Sakaria had a radio with him on the airplane. He said that he and the other passengers heard about the attack on radios.

11. The following day my family and I took Mr. Sakaria to Volos, a drive that took seven hours because we made frequent stops. Although Mr. Sakaria continued to refuse any food, he drank large quantities of liquids. He continued to talk about the incident in Rome, thanking God that he was alive, and describing the bodies and the blood. At times, he broke out in tears.

12. When we arrived in Volos shortly before 2:30 p.m., Mr. Sakaria insisted on going to a travel agency to change his return ticket to another airline. He was very angry that the TWA flight had stopped in Rome when he had ordered a non-stop flight. We stopped at a travel agency, but it was closed. After waiting a while, I persuaded him to change his reservation at a later time. We proceeded to a bakery, owned by Mrs. Sakaria's sister, Eleni Fania, where Mr. Sakaria's son was staying. From there we went in two cars to Gazea, a village about 17 miles from Volos where Mrs. Sakaria's parents lived and where Mr. Sakaria's daughter was staying.

13. We had dinner that night at the house of Mrs. Sakaria's parents, Lambros and Maria Stamoulis. Mr. Sakaria continued to refuse to eat, protesting that he would vomit as he had at the airport. Several times during dinner he broke out in tears. He continued talking about the accident, talking about how lucky he was and how he would have been shot, too, if the plane had arrived only a little bit earlier.

14. The next morning I was up early with my family to go visit a monasteries [sic] in Meteora. Mr. Sakaria was apparently still asleep, and I planned to leave without him. However, Mrs. Stamoulis asked me to take Mr. Sakaria to see a doctor in Volos on our way to Meteora. She went to wake him up and found that he would not move. He was cold to the touch and had no breath to fog a mirror.

15. I took Mr. Sakaria's body to the hospital in Volos. A doctor there pronounced him dead. The doctor told me he had probably died sometime before midnight.

16. I have known Mr. Sakaria since 1967. I saw him frequently in the years and months preceding his death. Although an automobile accident in 1978 affected Mr. Sakaria's memory, I have never known him to fabricate stories or to invent accounts of things that never happened. I also never observed him to be as excited as he was about the events

in Rome. Normally he was a quiet person who had little to say. For these reasons, I am convinced that Mr. Sakaria was talking about events that really happened and that he was not imagining his account of what occurred.

17. I have personal knowledge of the facts set forth above. This affidavit has been translated to me into Greek by an interpreter. I declare under penalty of perjury that the foregoing is true and correct.

Executed March 22, 1991

/s/ Nick Bafitis
Nicholas M. Bafitis

TRANSLATOR'S CERTIFICATE

FROSSO PANTELIDES declares as follows:

I am a Greek citizen temporarily residing in the United States. I attended an American high school in Cyprus where classes were conducted in English and took additional courses, in English, Heatherleys School of Art, in London, and New York University, in New York. I have worked as a professional English/Greek interpreter for over 10 years. I have passed two tests by the United States State Department for conference interpreting and for written translations.

I certify, under penalty of perjury, that I have interpreted the foregoing affidavit into Greek to Nicholas Bafitis before he signed this affidavit and that my interpretation was true and correct to the best of my ability.

/s/ F. Pantelides
Frosso Pantelides

Dated: March 22, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ELPIS SAKARIA, et al., :
:
Plaintiffs, :
Civil Action No. MJG-87-3462
-against- :
:
TRANS WORLD AIRLINES, :
:
Defendant :

AYUB K. OMMAYA, M.D., declares as follows:

1. I am a physician licensed to practice in Maryland, specializing in neurological surgery. I have been board certified in neurosurgery by The American College of Surgeons, and am a Fellow of the American college of Surgeons.

2. I examined and evaluated Jack Sakaria in my office on January 18, 1979 and again, in August, 1979. He gave the history of being struck by an automobile traveling at a high speed on October 20, 1978, causing him to sustain a severe head injury, and leaving him with symptoms of memory impairment, frustrations with his daily activities, and a lack of sense of time. My physical examination of Mr. Sakaria on January 18, 1979 revealed no neurological deficits. Mr. Sakaria had clinical evidence of bifrontal/bitemporal brain contusions. A diagnostic EEG performed on January 31, 1979 was normal with no evidence of a seizure disorder, and a brain MRI performed in 1979 demonstrated findings indicative of a left frontal encephalomalacia, consistent with a head injury. When I next saw Mr. Sakaria on August 23, 1979, Mr. Sakaria's clinical condition had improved considerably, as did his memory functions. This progress was confirmed by his wife who was in attendance at both visits.

3. Mr. Sakaria had no history of psychomotor epilepsy, and no history of delusions, hallucinations, or confabulation. He

had no history of or reason to display symptoms of delusions, hallucinations, or confabulation.

4. I have been told that Mr. Sakaria sustained a heart attack in Greece, in December, 1985, after flying on a flight that stopped in Rome. I have further been told that Mr. Sakaria described, to persons in Greece, a terrifying experience in Rome that included being confined in an aircraft without adequate ventilation, and viewing the blood stained bodies of persons who had been killed in a terrorist attack.

5. On the basis of my review of my records and file, I can state unequivocally that Mr. Sakaria was not suffering from a mental illness or mental disease or mental infirmity of an idiopathic nature as a result of the head injury. Consequently, it is highly unlikely that Mr. Sakaria experienced delusions, hallucinations, or confabulation on the date of the incident in question. Rather, in my opinion, to a reasonable degree of medical certainty, Mr. Sakaria's experience was based on reality.

6. I declare under penalty of perjury that the foregoing is true and correct.

Executed April 17, 1991

/s/ Ayub K. Ommaya, M.D.
Ayub K. Ommaya, M.D.